NO. 81219-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LOUIS LANCILOTI,

Appellant.

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES

1. Article I, section 22 of the Washington constitution says that in criminal prosecutions, the defendant has a right to a trial by a "jury of the county" where the crime was alleged to have been committed. This Court has held that, with express legislative authorization, juries may be drawn from a geographical area smaller than the total county, as long as all jurors reside in the county. To increase participation in jury service and to enhance the representativeness of jury venires, the King County Superior Court promulgated a rule – pursuant to express legislative authorization – that created two jury assignment areas in King County. Jurors are summoned randomly to serve from the north area for trials at the King County Courthouse and from the south area for the Norm Maleng Regional Justice Center. All jurors are King County residents. Does this rule comply with article I, section 22?

2. It is the policy of the State of Washington to encourage jury service, to spread service to as many citizens as possible, and to minimize the burdens of service on jurors who are summoned. RCW 2.36.055 and King County Local General Rule (LGR) 18 were designed to further each of these goals by summoning jurors to serve at the courthouse closest to their homes. Is the rule sound policy that is consistent with the Washington constitutional right to vicinage and with Washington statutes?

3. A jury selection procedure satisfies the Sixth Amendment if a fair cross-section of the community is selected in drawing a venire and if no large, distinct groups are systematically excluded from service. The Sixth Amendment does not require that jurors be drawn from the whole county. Lanciloti's jury was drawn at random from a fair cross-section of jurors in the Seattle jury assignment area for a crime that was alleged to have been committed in Seattle. No large distinct groups were excluded, systematically or otherwise, in this process. Has Lanciloti failed to show systematic exclusion of jurors that resulted in less than a fair cross-section of jurors from Seattle, or from the county?

B. FACTS

Lanciloti was arrested for possession of methamphetamine, alleged to have occurred on July 15, 2007, in the City of Seattle. CP 2-3. He was charged by information under King County Cause Number 07-C-06093-2 SEA. The last three letters of the cause number indicate that the case was assigned to the Seattle case assignment area, at the King County Courthouse.

On January 28, 2008, the case was assigned for trial to Department 42 of the King County Superior Court, in the King County Courthouse, the Honorable Christopher Washington presiding. At the start of trial, Lanciloti asked the trial court to declare RCW 2.36.055 and King County

Local General Rule (LGR) 18 unconstitutional and, thus, to invalidate the jury venire, because it was drawn from a master list compiled from less than the entire county. The trial court ruled that the statute and the rule were constitutional under both the state and federal constitutions and certified that the controlling issue was a pressing legal claim that should be decided by this Court. RP 34-37; CP 1539-40; 1541-43. Lanciloti filed a motion for direct, discretionary review of that ruling and the State of Washington joined that motion. This Court granted review.

C. SUMMARY OF THE ARGUMENT

A long-standing precept of criminal law states that a person should be tried in the community where the crime was committed, by a jury of that community. This precept is embodied by the concepts of venue and vicinage. Venue means a trial in the locale where the crime was committed, whereas vicinage means a trial made up of jurors from the vicinity of the crime. The rights to venue and vicinage are protected by article I, sections 21 and 22 of Washington State Constitution establishing that the right to jury trial is inviolate, and that in all prosecutions the accused has the right to a "jury of the county" where the crime was committed.

This Court held in State v. Twyman that the phrase "jury of the county" means simply that all jurors must reside in the county. This

Court also held that the legislature may expressly authorize a court to select juries from a subdivision of the county but, without such express legislative authorization, jurors must be drawn county-wide.

Based on these constitutional provisions, this Court's decisions interpreting those provisions, and on experience in King County that suggested more representative, impartial, and fair juries could be selected if drawn from areas closer to the place of trial, the King County Superior Court sought permission from the legislature to select jurors from jury assignment areas near each of two courthouses. The 59th Legislature unanimously amended RCW 2.36.055 to expressly authorize counties with more than one courthouse to draw jurors from jury assignment areas surrounding the courthouses. Laws of 2005, Ch. 199. LGR 18 was promulgated to implement the statute.

Lanciloti claims that the Washington State Constitution, as interpreted by a number of decisions in the early 1900's, precludes such legislation since juries must be drawn from the whole county. He argues that Twyman applies only to district courts. The State respectfully argues that Lanciloti's interpretation of the constitution and Twyman are incorrect. The State's argument can be outlined as follows.

This Court's decision in State v. Twyman confirms the power of the legislature to authorize juries from subdivisions of the county.

Twyman applies to superior courts as well as courts of limited jurisdiction because the right to a "jury of the county" is the same regardless of whether a person is charged with a felony or a misdemeanor. Twyman is consistent with and, indeed, is built upon this Court's early decisions. Moreover, article IV, section 5 of the Washington State Constitution expressly grants the legislature and the courts broad authority to manage the superior courts.

Because it was understood at the time of the founding that the legislature had authority to authorize juries from less than the entire county, and because this Court's early decisions recognize that legislative authority, this Court should hold that RCW 2.36.055, which authorizes King County to select jurors from areas closest to two courthouses, is constitutional. The statute will increase citizen participation on juries, it will reduce the burdens of service, and no juror will be excluded. In the end, the statute will advance legitimate policy aims of the legislature while also advancing the age-old tradition of trial by the vicinage.

Lanciloti also claims that dividing the county into two jury assignment areas violates his rights under the Sixth Amendment of the Federal Constitution. This claim fails because the federal constitution does not guarantee a jury from any particular geographic region, and

because the juries in both King County jury assignment areas are a fair cross-section of the community.

D. ARGUMENT

1. ARTICLE I, SECTION 22 OF THE WASHINGTON CONSTITUTION GUARANTEES A FAIR AND IMPARTIAL JURY OF RESIDENTS IN THE COUNTY WHERE THE CRIME WAS ALLEGED TO HAVE BEEN COMMITTED; RCW 2.36.055 AND LGR 18 PRESERVE THAT RIGHT.

A statute is presumed to be constitutional and the party challenging its constitutionality bears the heavy burden of proving beyond a reasonable doubt that it is unconstitutional. State v. Thorne, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996).

a. Legal Framework For Summoning And Selecting A Jury And Recent Amendments To That Framework.

Trials should occur in the community where the crime is alleged to have been committed. This long-standing principle results in the rights of venue and vicinage. Venue means the locale in which the crime was committed; vicinage means the area from which jurors are drawn. 5 LaFave, Israel and King, Criminal Procedure, § 22.2(e) (2nd ed. 1999); Drew Kershen, Vicinage (pts. 1 & 2), 29 Okla.L.Rev. 803 (1976), 30 Okla.L.Rev. 1 (1977) (arguing that vicinage is an important right distinct from venue); Steven A. Engel, The Public's Vicinage Right: A

Constitutional Argument, 75 N.Y.U.L. Rev. 1658 (discussing the history and constitutional underpinnings of vicinage rights). See also Commonwealth v. Farrell, 24 Pa. D. & C. 618 (1935) (term "vicinage" in state constitution is equivalent to "neighborhood" or "vicinity," and is an indefinite area, extent and limits of which may be declared by legislature); State v. Baldwin, 305 A.2d 555 (Me. 1973) ("vicinity," as used in state constitution section describing right to trial by jury of the vicinity, is not equivalent to "county" but rather means "neighborhood").

In Washington, these rights are secured by the state constitution in two articles: article I, section 21, which provides that the right to jury shall remain inviolate, and article I, section 22, which provides that in all criminal prosecutions, the accused shall have the right to a fair and impartial jury of the county where the crime is alleged to have occurred.

There are three kinds of juries in Washington: grand, petit and inquest. RCW 2.36.020. A petit jury "means a body of persons twelve or less in number in the superior court ... drawn by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact." RCW 2.36.010(6). A petit jury is drawn from a "jury source list" which is:

> ...the list of all registered voters for any county, merged with a list of licensed drivers and identicard holders who reside in the county. The list shall specify each person's name and

> residence address and conform to the methodology and standards set pursuant to the provisions of RCW 2.36.054 or by supreme court rule. The list shall be filed with the superior court by the county auditor.

RCW 2.36.010(8). A "master jury list" is created from the "jury source list." The "master jury list" is "the list of prospective jurors from which jurors summoned to serve will be randomly selected. The master jury list shall be either randomly selected from the jury source list or may be an exact duplicate of the jury source list." RCW 2.36.010(9). The creation of source lists and master lists is governed by statute and court rule. RCW 2.36.054 and .063; General Rule (GR) 18; LGR 18. The manner of compiling source lists and master lists is governed by a statute, RCW 2.36.055, which provides that such lists be created annually and filed with the clerk of the superior court.

In 2005, the presiding judge of the King County Superior Court, the Honorable Richard Eadie, testified in support of a bill that would allow jury source lists to be generated from a subset of the county, rather than from the county at large. Laws of 2005, Ch. 199 (HB 179). The bill was also supported by Mr. Rowland Thompson of the Washington State Jury Commission. See Laws of 2005, Ch. 199, House Bill Report, H.B. 1769, p.2. It was the product of efforts by judges in the King County Superior Court who had studied ways to improve citizen participation in jury service.

Those judges concluded that overall juror response rates would be significantly improved if jurors were summoned for service at the courthouse closest to their home. See CP 120-145 (Letter from Hon. Ronald Kessler and supporting data); CP 1544-93 (Declaration of Hon. Michael J. Fox).[1]

The bill provided as follows:

> Sec. 1. The legislature finds that superior courts with more than one superior court facility are asking some jurors to travel excessively long distances to attend court proceedings. In these cases, the legislature further finds that consideration of a juror's proximity to a particular courthouse can be accommodated while continuing to provide proportionate jury source list representation from distinctive groups within the community. The legislature intends to lessen the burdens borne by jurors fulfilling their civic duties by providing a mechanism that narrows the geographic area from which the jurors are drawn while maintaining a random and proportionate jury pool.

The bill passed unanimously in both the House and the Senate. Final Bill Report, HB 1769. The amendment added the following provision to RCW 2.36.055:

> Sec. 2. . . . In a county with more than one superior court facility and a separate case assignment area for each court facility, the jury source list may be divided into jury assignment areas that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area. Jury assignment area boundaries may be designated and adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges on the superior

[1] Lanciloti has moved to strike this declaration. Because there has not yet been a ruling on the motion to strike, the declaration will not be discussed in detail in this brief.

court when required for the efficient and fair administration of justice. . . .

In 2006, the King County Superior Court promulgated a general rule to implement RCW 2.36.055 as amended:

> XIII. General Rules; GR 18. Jury Assignment Area
>
> (e) Location for Jury Assignment Areas for Civil and Criminal Cases Filed in King County.
>
> (1) Designation of Jury Assignment Areas. The jury source list shall be divided into a Seattle jury assignment area and a Kent jury assignment area, that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area. The area within each jury assignment area shall be identified by zip code and documented on a list maintained by the chief administrative officer for the court.
>
> (2) Assignment or Transfer by Court. This rule shall not create a right in any individual to have a case tried before a jury from a specific jury assignment area. The Court on its own may assign cases to be heard by jurors drawn from another case assignment area in the county, or from the entire county, or may assign or transfer cases to another case assignment area pursuant to LR 82(e)(4)(C) or LCrR 5.1(d)(2)(C), as applicable, whenever required for the just and efficient administration of justice in King County.
>
> (3) Where Jurors Report. Individuals receiving a jury summons shall report for service to the Court facility in the jury assignment area identified on the face of the summons.
>
> (4) Adjustment of Jury Assignment Area Boundaries. The jury assignment areas contained in this rule may be adjusted by the administrative office of the courts based on the most current United States census data at the request of the majority of the judges of the superior court

> when required for the efficient and fair administration of justice.

LGR 18. The superior court noted that the "purpose of the statute and this rule is to lessen the burdens borne by jurors in traveling long distances to attend court proceedings by narrowing the geographic area from which jurors are drawn while maintaining a random and proportionate jury pool." LGR 18 (official comment).[2]

The case assignment areas for criminal cases are defined in LCrR 5.1(d)(2) and the case assignment areas for civil cases are defined in LR 82. With the exception of one small area of unincorporated King County in the Sheriff's Department's Precinct Number Four, all cities north of Interstate 90 (or straddling its border) are in the Seattle case assignment area for criminal cases. All cities that are not in the Seattle area are in the Kent area. LGR 18 permits a judge to change the case assignment designation upon request of any party. LGR 18(e)(2). The boundaries of the jury assignment areas can be changed only if a majority of the superior court judges recommend change, and only after approval by the administrative office of the courts, an agency appointed and supervised by the chief justice of the supreme court. LGR 18(e)(4); 2.56.030 (powers and duties of administrator of the courts).

[2] LGR 18 has been suspended pending this Court's decision in this case.

b. Const. Art. I, § 22 Requires A Jury Of County Residents, Not Necessarily A Jury Drawn From The Entire County.

Lanciloti argues that the state constitution guarantees a jury drawn from the county at large. He relies on article I, section 22 which provides:

> In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

At issue is whether the phrase "jury of the county" means that only county residents can be on a jury source list, or whether the phrase means that a jury source list must be composed of jurors drawn from the entire geographical area of the county.

Arguments identical to Lanciloti's were considered and rejected by this Court seven years ago in State v. Twyman. Jerry Twyman was convicted of crimes in the Shoreline Division of the King County District Court. He claimed that his convictions should be reversed because his jury was chosen from a geographical subdivision of King County, instead of from the county as a whole. Twyman, 143 Wn.2d at 123.[3]

[3] Twyman also asserted that jurors must be selected from the "area served by the court," and that imprecision in the means of summoning jurors resulted in over and under-inclusion of jurors. This Court rejected the statutory argument because selecting jurors according to zip codes that were contiguous to the boundaries of the Shoreline division of the King County District Court, although not coextensive with the precise geographical boundaries of the area served by the court, substantially complied with the statutory scheme. Twyman, at 120-22.

This Court unanimously rejected Twyman's argument, finding it "unpersuasive on its face." Id. This Court first noted that the legislature had specifically authorized district courts to select jurors from "*a much narrower geographic range*" than the county as a whole. Id. (citing RCW 2.36.050 and *quoting* Carrick v. Locke, 125 Wn.2d 120, 145, 882 P.2d 173 (1994)).

Second, this Court observed that it had earlier held that juries could be drawn from a part of the county if legislatively authorized. Twyman, at 123-24. The Court quoted at length from State v. Newcomb, 58 Wash. 414, 418, 109 P. 355 (1910), and its discussion on the history of the vicinage rule in Washington:

> [The] rule was gradually changed until the law was satisfied if the jury was returned from any part of the county; and the words 'jury of the county,' as used in our constitution, have never been held to mean more than that the jurors, when summoned, should come from some *part* of the county.

Twyman, at 123-24 (quoting Newcomb, 58 Wash. at 418). This Court also noted that "Newcomb held that `[t]here is no method provided for in the constitution for summoning jurors, nor does it attempt to define their qualifications. Hence such matters can be safely and properly left to *legislative enactment*.' " Id. at 124 (italics in original — quoting Newcomb, at 418). Thus, the primary holding of Twyman was that a jury

primary holding of Twyman was that a jury venire may be selected from part of the county if the legislature authorizes that practice.

Third, this Court observed that "[a]n essential element in selecting jurors is the element of chance. The ... people have found no better way and have made it the *supreme test* of sufficiency." Id. at 124 (italics in original – quoting State ex rel. Murphy v. Superior Court, 82 Wash. 284, 286, 144 P. 32 (1910)). Because the jury pools in Twyman were randomly drawn, they had the essential element of chance that is at the heart of a fair jury selection procedure. Thus, this second holding in Twyman emphasizes the importance of retaining the element of chance in jury selection.

This Court also discussed Fugita v. Milroy, 71 Wash. 592, 129 P. 384 (1913), a petit larceny case in which a police judge summarily ordered the Yakima County sheriff "to summon 'sixteen good and lawful men' 'from the body of your city' to act as trial jurors in the case." Fugita, at 593. This Court noted that the chief deficiency with jury selection in Fugita was the fact that the judge limited jury selection to the city rather than the county "without express legislative sanction." Twyman, at 125. This Court said that

> ..it was **only** within that particular context, **and lacking legislative guidance**, that we wrote, "it would seem that the

> words 'jury of the county' mean a jury of the whole county, and not a jury of some particular part of the county."

Id. (bold added). Thus, in Twyman, this Court recognized that Fugita never held that a jury must always be drawn from the entire geographical area of the county. Rather, the focus in Fugita was on the need for legislative authorization; unilateral action by a judge was forbidden.

Finally, this Court concluded its opinion in Twyman by reiterating the importance of random selection of jurors. Twyman, at 126 ("RCW 2.36.050 conforms with Const. art. I, § 22 by preserving randomness in the selection of district court jury pools").

c. The Holding In Twyman Applies To All Courts, Not Just District Courts.

Lanciloti claims that the holding in Twyman applies only to courts of limited jurisdiction because district courts are creatures of statute whereas superior courts are constitutional courts. This argument should be rejected; nothing in the language of the constitution or in Twyman restricts the right to a "jury of the county" to a certain type of prosecution.

First, the plain language of article I, section 22 makes it clear that the section applies to all criminal prosecutions, not just to a certain class of cases. The section provides, "**[i]n criminal prosecutions** the accused shall have the right to . . . have a . . . trial by an impartial jury of the county . . ." (bold added). The phrase "in criminal prosecutions" does not

distinguish between prosecutions in superior courts and those in lesser courts; it thus applies to all prosecutions.

Second, in City of Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1983), this Court interpreted article I, sections 21[4] and 22 and held that, because the right to jury trial had always extended to misdemeanors and felonies, the constitution required a jury in courts of limited jurisdiction. If article I, sections 21 and 22 apply equally to all prosecutions, there is no *constitutional* basis for applying it differently in district and superior courts.

Third, the holding in Twyman was much broader than Lanciloti claims. Lanciloti cites to a footnote in Twyman as the holding of the case, and claims that Twyman held that a jury from part of the county is constitutional *because* district courts are creatures of statute. Br. of Appellant at 15-16 (citing Twyman, at 124 n. 34). The holding of a case is not ordinarily stated in a footnote, although a supporting reasoning might be.[5] In truth, Twyman relied on Newcomb to hold that selecting a venire from part of the county is permissible if the legislature authorizes the

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[4] Const. Art. I, § 21 provides: "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

[5] See State v. Johnson, 69 Wn. App. 189, 194 n. 4, 847 P.2d 960 (1993) (placing an argument in a footnote is, at best, ambiguous or equivocal as to whether the argument is part of the appeal, and an appellate court may decline to address the argument).

practice. The quotes from Newcomb and Fugita confirm as much: the footnote is simply an aside. It adds weight to the conclusion already drawn in the holding of the case but it is not a holding of the court.

Finally, Lanciloti's narrow interpretation of Twyman fails to appreciate that the holding in Twyman -- that the legislature may authorize selection of jurors from less than the entire county -- is consistent with the general grant of legislative and judicial authority to manage superior courts that is contained in article IV, section 5 of the Washington Constitution. That provision is entitled: "SUPERIOR COURT -- ELECTION OF JUDGES, TERMS OF, ETC." It says in pertinent part:

> There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election...
>
> In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof...and **the business of the court shall be so distributed and assigned by law or in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof.**

Const. art. IV, § 5 (bold added). In other words, the Washington Constitution delegated to the legislature and the courts the power to manage court business in the best way possible. For instance, the legislature has power to manage substantive matters affecting the courts,

and the courts maintain authority over purely procedural matters. See State v. Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002); RCW 2.04.190. Likewise, the legislature and the courts can define the manner of selecting jurors, the impaneling of jurors, their qualifications, and the grounds for challenging them. Because the specifics of jury selection are not spelled out in the constitution, article IV, section 5 authorizes the legislature and the courts to manage those processes. See Newcomb, at 419.

d. Lytle, Newcomb, And Fugita Are Consistent With Twyman.

In various places throughout his opening brief, Lanciloti claims that three prior decisions by this Court require all-county jury venires in superior court. He relies on State ex rel. Lytle v. Superior Court, 54 Wash. 378, 103 P. 464 (1909), State v. Newcomb, and Fugita v. Milroy to support his argument. Lanciloti's arguments must fail; Twyman relied upon and interpreted Lytle, Newcomb and Fugita in holding that juries from part of the county are permissible. These decisions are consistent with each other. Moreover, if a jury cannot be selected from a part of the county, then the theoretical foundation for the holding in Twyman is undermined. Additionally, Lanciloti's interpretation of this Court's prior decisions would be inconsistent with Carrick v. Locke, 125 Wn.2d at 145, which recognized the authority of the legislature to select juries from less

than the entire county. Most importantly, Lanciloti's interpretation of Newcomb and Fugita are flawed because he fails to understand the limits of Lytle.

At issue in Lytle was a lengthy statute passed in early 1909 that made sweeping changes to numerous aspects of the superior courts of Washington. Laws of 1909, p.82, ch. 49. The act had 18 sections authorizing the board of county commissioners in each county to divide the county into multiple districts, each containing its own court, courthouse, distinct name, officials, personnel, jail, judges, seals, record-keeping systems, venues, rules for changing venue, and the rules for service of process. Lytle, at 382-83, 85. The act effectively created multiple, independent district-based superior courts within a single county. For instance, under the terms of the act, it appeared that if a person was sued in district 1 of Chehalis county and appeared in district 2 of the same county, but not in district 1, he would be subject to a default order in district 1. Sections 13 and 18 of the act actually say that "for purposes of this act each district shall be considered as a separate and distinct county." Laws of 1909, ch. 49, §§ 13, 18.

A writ of prohibition was sought to enjoin implementation of the act and numerous arguments against its constitutionality were advanced, but this Court observed, "It is not necessary to discuss each of these

several assignments." Lytle, at 383. Instead, this Court addressed only two arguments: 1) the claim that the act violated Const. art. IV, § 5 (one superior court per county); and 2) the claim that the act violated Const. art. XI, § 3 (no county shall be formed containing fewer than 2000 residents).

In the end, this Court held that the sweeping terms of the act created multiple superior courts in a single county, and was thus unconstitutional. Id. at 384-86. The Court stated:

> We fail to see how the Legislature, or any other body, can create a separate and distinct constitutional county, or a district, for judicial or other purposes, which is to be considered and regarded as a separate and distinct constitutional county, unless it be after first ... determining that constitutional condition precedent, required in the establishment of a 'separate and distinct constitutional county.'

Lytle, at 389. The 1909 act was unconstitutional because it changed the jurisdiction of the superior courts. The superior court of any given county has jurisdiction over, inter alia, all felonies committed in the county. Art. IV, § 6. But, if the superior court is divided into independent districts, the jurisdiction of any single court in any individual district has been curtailed.

> Every constitutional county in this state has conferred upon its superior court a certain jurisdiction, and the attempt of this act to consider the district as a separate and distinct constitutional county is nothing less than an attempt to take

> from the superior court of Chehalis county a jurisdiction which under the Constitution it now has, and divide that jurisdiction between the superior court of district No. 1 and the superior court of district No. 2; each district for that purpose being a separate and distinct constitutional county.

Lytle, at 391.

This Court also discussed the apparent problems that had been created under similar statutory schemes in the states of Mississippi and Arkansas, where legislation had provided that

> each [district] shall be as independent of, and distinct from, each other, and shall hold the same relation to each other as if they were courts of different constitutional counties of this state, and shall be deemed for all purposes of this act separate and distinct counties, with original and exclusive jurisdiction within their respective territorial limits.

Lytle, at 388 (quoting Ark. Laws of 1871, p. 292, and Patterson v. Temple, 27 Ark. 203 (1871)). This Court concluded that the 1909 Washington statute, like the Arkansas statute, changed the jurisdiction of the superior courts.

Lytle never held, however, that simply allowing a jury venire to be drawn from less than the whole county violates article I, section 22. In fact, Section 13 of the 1909 act is discussed in passing only once, and in a context that suggests that the Court disapproved of the provision that required jurors be drawn *solely* in one district or the other, and that they be required to serve only in the district where they reside. Lytle, at 390. The

Court did not independently strike down Sections 13 and 18 because they did not, standing alone, alter the jurisdiction of the superior courts.

Thus, Lytle struck down a sweeping and unique piece of legislation which was designed "to make two or more separate courts out of one court, with exclusive original jurisdiction in a territory less than the constitutional unit, which is the county itself, and within which there can be but one court, whatever number of departments may be established for the more convenient trial of causes." Id. at 393-94 (Chadwick, J. concurring).

Neither RCW 2.36.055 nor LGR 18 create – expressly or in fact – independent courts within a single county. No provision states that "for purposes of this act each district shall be considered as a separate and distinct county." No provision creates a new superior court division or makes any superior court division independent of any other superior court division. And, in fact, the King County Superior Court remains the sole superior court in King County; its judges are elected to a single court, there is a single name for the King County Superior Court, there is but one group of judges, those judges sit at both courthouses, there is only one clerk of the court, there is one set of court personnel, there is one seal of

the court, the manner and style of service of process is the same in both locations, and the superior court still has the option of summoning jurors county-wide. LGR 18(e)(2). RCW 2.36.055 and LGR 18 are consistent with Lytle since neither deprives the superior court of jurisdiction to summon jurors in either sub-county jury assignment areas. LGR 18(e)(2). For these reasons, RCW 2.36.055 does not resemble Laws of 1909, ch. 49 – the law stricken down in Lytle – and the narrow holding of Lytle is not binding in this case.

Moreover, recognizing how narrow the holding in Lytle actually is clarifies the meaning of Newcomb and Fugita. Newcomb was decided a mere nine months after Lytle. It simply held that the "three box" method of jury selection – whereby names of jurors from three regions of the county were drawn from three boxes and then seated in proportion to those three regions – did not violate the state constitution because jurors from the entire county were *in fact* represented in the venire. Newcomb, at 417. Newcomb also observed, however, that a jury could be drawn from part of the county and that the manner and means of its selection could be left to legislative enactment, since such manner and means were not established in the constitution. Id. at 419-20. These statements in Newcomb would

be simply wrong if Lytle had held – a mere nine months earlier – that a venire must be drawn from the whole county.[6]

Finally, as noted above, this Court said in Fugita that the defendant is entitled to have a venire extended to the body of the county unless the legislature sanctions drawing the jury from a lesser geographical area. Fugita, at 597 (citing Lytle). The practice in Fugita was rejected not because the jury was drawn from too narrow an area, but rather because a single judge had sua sponte narrowed that area, in the absence of an express directive from the legislature. Thus, Fugita is consistent with Newcomb, Lytle, and Twyman.

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[6] In Newcomb this Court discusses Sixth Amendment case law in detail. The Sixth Amendment cases hold that with legislative authorization a jury may be chosen from less than the county. There would be no reason to discuss these cases unless this Court understood the law in Washington to permit such legislation. See Newcomb, at 418-19. ("The Constitution of the United States, by the sixth amendment, provides that: 'In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.' Section 802, Rev. St. U. S. (U. S. Comp. St. 1901, p. 625), provides: 'Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense or unduly to burden the citizens of any part of the district with such services.' The constitutionality of the latter statute has been sustained in the following cases: U. S. v. Stowell, 2 Curt. 153, Fed. Cas. No. 16,409; U. S. v. Richardson, (C. C.) 28 Fed. 61; U. S. v. Chaires, (C. C.) 40 Fed. 820; Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624." Modern federal authority is the same; there is no constitutional right to have a jury drawn from that portion of the federal judicial district where the crime was committed, see, e.g., United States v. Baker, 98 F.3d 330 (8th Cir. 1996); United States v. Florence, 456 F.2d 46 (4th Cir. 1972), or to have jurors drawn from the entire judicial district, see, e.g., United States v. Bahna, 68 F.3d 19 (2nd Cir. 1995); United States v. Cannady, 54 F.3d 544 (9th Cir. 1995); Zicarelli v. Gray, 543 F.2d 466 (3rd Cir. 1976) (federal right to vicinage did not require jurors be drawn from the entire federal judicial district; right satisfied if jurors were drawn from a single county as long as the two counties were in the same district).

In sum, this Court's decision in Twyman establishes that the phrase "jury of the county" in our state constitution means simply that a jury venire be drawn from county residents, in a manner approved by the legislature. Because RCW 2.36.055 and LGR 18 require a jury to be made up of county residents, and because they establish a manner of jury selection that is fair, impartial, and random, they are constitutional.

e. Jury Practices in Territorial Days Appear To Have Assumed That The Legislature Had Power To Authorize A Jury From Less Than The Whole District Or County.

Generally, a constitutional provision should be analyzed in light of the procedure and practice around 1889 to assist in determining the framers' intent. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003). Sometimes, there is clear evidence in the historical record that sheds light on the question. Smith, 150 wn.2d at 154 (citing Laws of 1866, § 239, in Statutes of the Territory of Washington 102 (1866) to illustrate that in 1889 juries did not have a role in sentencing). Often, however, the historical evidence is less clear, so that a definitive conclusion is difficult to draw from any single piece of information, and a broader historical perspective is needed.

That seems to be the case as to the meaning of the phrase "jury of the county." There is no single law or piece of historical evidence that

unequivocally demonstrates that the phrase means that a jury must be drawn from the whole county, or that it may be drawn from part of the county. Still, the available evidence suggests that the Washington territorial legislature exercised authority in determining the manner of selecting jurors, including the area from which jurors were to be selected, and that this practice was well-established and understood in 1889. It follows that the framers of Washington's constitution did not mean to eliminate that authority simply by using the phrase "of the county."

In territorial days, Washington had three large judicial districts with numerous counties in each district. Leschi v. Territory, 1 Wash. Terr. 13, 15 (1857); Charles H. Sheldon, A Century of Judging, A Political History of the Washington Supreme Court, p.15-16 (University of Washington Press, 1988). It appears that juries were drawn from many parts of the district, but it is not clear whether they were always, commonly, sometimes, or seldom drawn from the entire district. There is evidence, however, that juries *could* be drawn from part of the district. For example, when there would be prejudice to a defendant in having jurors from a certain county of the district sit at his trial, jurors from one county could be excluded. McAllister v. Territory, 1 Wash. Terr. 360 (1872). Citing a territorial statute, the Court held that jurors from Walla Walla county could be excluded from the district jury pool to avoid

prejudice. McAllister, 1 Wash. Terr. at 362. Thus, the court allowed jury selection from less than the whole district pursuant to statutory authority.

Another piece of historical evidence suggests that the framers assumed the legislature could authorize juries from less than the body of the district or county. In Yelm Jim v. Washington Territory, 1 Wash. Terr. 63, 65 (1858), the defendant was tried and convicted of murder. Due to an irregularity in drawing a grand jury, the judge directed the sheriff "to summon a grand jury of sixteen qualified persons from the bystanders..." Yelm Jim, 1 Wash. Terr. at 64. Obviously, there was no requirement in the order that the jury represent the whole district, or even each county in the district. Yet, this practice had been authorized by the territorial legislature in a statute that provided as follows:

> When, from any cause, there are not sufficient number of qualified and competent grand and petit jurors in attendance, the Court may order a sufficient number of qualified jurors to be summoned from any county or counties in the district.

Id. at 65. See General Laws of Washington Territory, Sec. 7, p.19 (1857) ("An Act to Provide For the Manner of Selecting and Procuring the Attendance of Jurors at the Terms of District Courts"). The defendant claimed that an order to summon "bystanders" was not an order to summon someone from the county or counties of the district. Id. The Territorial Supreme Court rejected the claim and held:

> [Selecting qualified bystanders],... would not alter the character of the jury, whether they were denominated talesmen, by-standers, or persons from the body of the county. Their qualifications, when so selected, must correspond with those required by law, and by-standers returned as qualified, will be presumed to be so qualified, until the contrary is shown.
>
> *Nor does it make any difference whether the persons so selected are taken from one or more counties within the district, as, by the act passed January 26, 1857, "county," and "district," so far as judicial proceedings in the District Court are concerned, are synonymous terms.*

Id. at 66 (italics added). In other words, the Court recognized that, although the Organic Act created Washington courts and divided them into districts, and although a jury from "the body of the district" is authorized by statute, the legislature also had the power to authorize a means of selecting juries from less than the whole district.[7]

Similar practices continued after statehood. If a jury could not be selected from the regularly summoned master list of jurors, the legislature authorized that an open or special venire could be selected. Pierce's Code, Juries, §§ 5941-42, p. 1026 (1902) (language identical to 1857 law). It appears such venires were selected by picking jurors off the street, a practice that likely resulted in a jury from less than the county. Still,

[7] This is almost precisely what this Court said 55 years later in Fugita, supra, where this Court held that a "jury of the county" would mean a jury from the body of the county, unless the legislature had authorized a different means of summoning jurors. Fugita, at 597.

litigants seem to have accepted the power of the legislature to authorize selection from juries less than the whole county, as no challenges to this law appear in subsequent cases.[8]

The first constitution approved by Washington voters provided that juries should be drawn from the "county or district" where the crime was committed. Wash. Const. art. I, § 22 (1878), reprinted in 10 Wash. Hist. Q. 59 (1919).[9] Referring to both "county" and "district" is consistent with the notion that, for purposes of jury selection, a jury may be summoned from either county or district, as long as it is fairly and randomly drawn. This language is also consistent with the holding in Yelm Jim, in which the Court found the terms "county and district" to be essentially synonymous. Yelm Jim, at 66.

Although the term "district" does not appear in article. I, section 22, there is nothing in the text or history of the constitution to suggest that the term was abandoned because the framers meant the county to be the *exclusive* geographical region for drawing jurors, incapable of modification by the legislature. It could just as well be that the term "district" was dropped because the new constitution eliminated the broad

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[8] In Newcomb, this Court alluded to the practice of selecting jurors from finite areas of the county when it referred to the "old law" under which a defendant might be tried by jurors drawn wholly from Tacoma. Newcomb, 58 Wash. at 417.

[9] The Constitution of 1878 may also be viewed at the website of the secretary of state. http://www.secstate.wa.gov/_assets/history/1889-Constitution-bw.pdf.

territorial judicial districts, so there was no longer any need for the term. In any event, the dominant understanding in the period before 1889 seems to have been that the legislature had the power to authorize the manner and means of selecting juries. Thus, it stands to reason that the framers did not intend to silently abrogate this power by adopting article I, section 22.

In short, the historical evidence suggests that the framers would have understood the legislature to have considerable authority to define the area from which a jury would be drawn. This general understanding would certainly explain the broad grant of legislative authority to manage court business that appears in article IV, section 5.

And, this historical evidence is consistent with this Court's decision in Twyman, and suggests that the legislature was understood to have power to authorize juries from an area smaller than the county. There is nothing in the phrase "of the county" to suggest otherwise, nor does other language of the constitution restrict legislative authority in that way. "A statute can be declared unconstitutional only where specific restrictions upon the power of the legislature can be pointed out, and the case shown to come within them, and not upon any general theory that the statute conflicts with a spirit supposed to pervade the constitution, but not expressed in words." State v. Vance, 29 Wash. 435, 459, 70 P. 34, 41

(1902) (rejecting a constitutional challenge to the jury act of 1901 which created the appointed position of jury commissioner and required that commissioners be lawyers); See also Smith v. City of Seattle, 25 Wash. 300, 65 Pac. 612 (1901) (nothing in the constitution restricts the power of the legislature to create local water districts; absent such limits, the legislature has the authority). For these reasons, this Court should hold that RCW 2.36.055 comports with the state constitution.

f. Foreign Constitutions And Cases Are Relevant In A Historical Sense, But Foreign Constitutions And Cases Do Not Establish The Meaning Of The Washington Constitution.

Comparing constitutional provisions and appellate decisions from other states is of limited value in this case due to the fact that each state uses slightly different language to define a right to jury, and many states also have subsidiary provisions dealing with court jurisdiction and juries.[10] For example, some state constitutional guarantees of vicinage generally grant defendants a right to trial by impartial jurors drawn from the "county." See e.g. Neb. Const. art 1 § 11. Others refer to the "county or district." See, e.g., Ohio Bill of Rights § 10. Still others refer to the "country," see, e.g. Vt. Const. ch. 1 art. 19, "vicinage," see, e.g., Penn.

[10] As defense counsel told the trial court, "...the Washington constitution in conjunction with the Washington statutes is what the Court has to look to, not the federal circuit law or any law outside the Supreme Court in the State of Washington." RP 6.

Const. art. 1 § 9, or "vicinity," see, e.g., N.H. Bill of Rights art. 17. Complicating matters further, many state constitutions have been amended over the years, so a thorough comparison requires analysis of modern as well as historic provisions for each state. It must then be determined what relevance these different words and amendments have in Washington.

Still, cases from around the time of the founding of the Washington constitution do shed some light on what the Washington framers would have understood to be the national practice. Many states that considered whether statutes directing that juries be drawn from within a judicial subdivision of a county violate the state constitutional right to a "jury of the county" determined that they do not. In Ellis v. State, 92 Tenn. 85, 20 SW 500 (1892), for example, the Court affirmed a statute establishing a special court for part of a county and requiring jurors to be selected from only that part of the county, holding that the statute did not conflict with the state constitutional right to trial by a "jury of the county."

Similarly, the Arkansas constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed." AR Const. Art. 2, § 10. In Terry v. State, 149 Ark. 462, 233 S.W. 673 (1921), a man was convicted as an accessory after the fact to the crime of murder in the first degree, and he appealed, claiming that his jury

should have been drawn from the whole county. The court held that the Northern District of Prairie County and Southern District of Prairie County were both parts of that county, and "the guaranty of the Constitution is met when jurors are selected from either division of the county." Terry, 233 S.W. at 675-76. The court also held that

> The General Assembly of 1921 had the right to amend the act of 1885. It had the authority to prescribe the practice of the courts of that county, and the authority of the General Assembly was limited only by the restrictions of the Constitution.

Id. at 676.

The Wyoming constitution also guarantees a "trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Wy. Const. Art. I, § 10. A statute permitted selection of a jury list that contains "the names ... of those who reside within five miles of the city or town where the court is held." In State v. Bolln, 10 Wyo. 439, 70 P. 1 (1902), the court held, "We think it is well settled that, in order to constitute a jury of the county or from the body of the county, it is not necessary that the jury, or the list from which it is drawn, should be selected from all parts of the county."

In Minnesota, the state constitution provides that in "all criminal prosecutions the accused shall enjoy the right to a trial by a jury of the county or district wherein the crime shall have been committed, which

county or district shall have been previously ascertained by law." Minn. Const. Art. I § 6. The Minnesota Supreme Court decided in a misdemeanor prosecution case that this section means simply that jurors must be county residents. State v. Kemp, 34 Minn. 61, 24 N. W. 349 (1885). The Court observed:

> ...the words "de corpore comitatus," "from the body of the county," "of the county," "of the vicinage," as they appear in English statutes and in American constitutions and laws, mean no more, as applied to jurors, than that they must come from some part of the given county. Sir Matthew Hale says that jurors are "to be de vicineto"; but this is not necessarily required, for they of one side of the county are by law de vicineto to try an offense of the other side of the county. 2 Hale, P. C. 264.

Kemp, 24 N.W. at 351. The court held that jurors may be selected from the geographical area served by the court.[11]

Courts have held, however, that the state constitutional right to vicinage is violated where the decision to draw jurors from less than the whole county is made by a judge or jury commissioner without legislative

[11] Many other courts have reached similar results. See also Shell v. State, 2 Ala.App 207, 56 So. 39 (1911) (legislation dividing county into two judicial divisions, establishing a court for each division, and drawing jurors for each court only from its subdivision does not violate the state constitutional right to trial by jury); Trimble v. State, 2 Greene 404 (Iowa, 1850) (it was not contrary to the state constitutional right to trial by jury to form two jury districts, two places for the sittings of the district court, and two jury venires in county); cf. State v. Jackson, 77 N.H. 287, 90 A. 791 (1914) (statute giving courts power to "direct the number of jurors to be summoned, and from what towns" did not violate the state constitutional right to "trial of facts in the vicinity where they happen" even though jurors in particular case were not drawn from every town in the county).

authorization. See Zanone v. State, 97 Tenn. 101, 36 S.W. 711 (1896) (under state constitutional guaranty of "a speedy public trial by an impartial jury of the county," the action of the court in directing the sheriff to summon a special venire entirely from the rural districts of the county – and excluding Memphis – is illegal); State v. Page, 12 Neb. 386, 11 N.W. 495 (1882) (commissioners' jury list that omitted jurors from adjacent county that was part of the judicial district violated defendant's state constitutional right to a "jury of the county"); In re Monroe, 13 Okla.Crim.62, 162 P. 233 (1917) (under state constitutional guarantee of trial by "jury of the county" except for petty offenses, a criminal prosecution cannot be tried in police court for that court cannot draw a jury from the entire county); Hewitt v. Saginaw Circuit Judge, 71 Mich. 287, 39 N.W. 56 (1888) (one of the principal objects in any mode prescribed for the selection of jurors has been that the panel shall come from the body of the county, and this means from every township in the county).

Thus, the cases from before 1889 and in the decades after confirm this Court's holding in Twyman: with express legislative authorization, a "jury of the county" is a jury of county residents, which may be chosen from a geographical subpart of the county.

g. LGR 18 Is Sound Policy And Preserves The Right To A Fair Jury.

The King County Superior Court judges analyzed demographic information about King County and compared those demographics to response rates at the two county courthouses. CP 120-145 (Letter from the Honorable Ronald Kessler); CP 1544-93 (Decl. of the Honorable Michael J. Fox). They concluded based on this evidence that amendments to RCW 2.36.055 and the promulgation of LGR 18 would increase the fairness and impartiality of juries in King County, without making the system any less random. When the evidence was presented to the legislature, it unanimously voted to authorize the amendment. See Laws of 2005, Ch. 199, Sec. 1; LGR 18 (Official Comments).

None of the census information submitted by Lanciloti undermines the legislative finding of fact. The most that can be said about Lanciloti's data is that there are differences between North and South King County, a truism. But, because the jury assignment areas divide the county into roughly equal geographical halves, no identifiable group -- racial, economic, religious, or political -- has been systematically excluded from jury service. In fact, no juror has been excluded from service at all, since they will simply serve in their local area, assuring the right to a trial in the vicinage as guaranteed by the constitution.

For these reasons, cutting King County in half – each half maintaining a richly diverse population – cannot be said to have reduced the fairness of juries in King County. In fact, since a greater percentage of the population is more likely to participate, it can be expected that a greater cross-section of the population of the vicinage will be represented on any given jury. Lanciloti's attacks on the policy are unfounded.

h. Lanciloti's Attacks On The Workings Of LGR 18 Do Not Apply To His Case And Do Not Undermine The Constitutionality Of The Rule.

In a series of arguments ostensibly under the rubric of "fair cross section" claims, Lanciloti argues that LGR 18 is arbitrary. Br. of App. at 24 ("The local rules ... are discretionary, unclear, and not uniform in application"). The arguments are not truly constitutional in nature; rather, they attack the workings of the rule under RCW 2.36.080. The arguments are either premised on a mistaken understanding of the court rules, or on hypothetical abuses that have nothing to do with the facts of this case. These claims should be rejected.

RCW 2.36.080 is a general statement of policy forbidding discrimination in jury selection. It applies to both superior and district courts and provides as follows:

> (1) It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that

> all qualified citizens have the opportunity in accordance with chapter 135, Laws of 1979 ex. sess. to be considered for jury service in this state and have an obligation to serve as jurors when summoned for that purpose.
> (2) It is the policy of this state to maximize the availability of residents of the state for jury service. It also is the policy of this state to minimize the burden on the prospective jurors, their families, and employers resulting from jury service. The jury term and jury service should be set at as brief an interval as is practical given the size of the jury source list for the judicial district. The optimal jury term is two weeks or less. Optimal juror service is one day or one trial, whichever is longer.
> (3) A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.
> (4) This section does not affect the right to peremptory challenges under RCW 4.44.130.

Nothing in LGR 18 or LCrR 5.1 violate the policies recommended by this statute. In fact, both rules make it more likely that people will sit as jurors by making service far more convenient, Thus, it furthers the legislative goal of increasing citizen participation in jury service.

Lanciloti also claims that because this statute uses the phrase "area served by the court" and because the area served by the superior court is the whole county, taking jurors from less than the county violates the statute. Br. of App. at 24. But this argument begs the question to be decided in this case, and it also ignores the more specific statute, RCW 2.36.055, which expressly authorizes counties with two justice centers to select jurors from a jury assignment area smaller than the entire county.

"A specific statute will supersede a general one when both apply." Huff v. Budbill, 141 Wn.2d 1, 20, 1 P.3d 1138 (2000). RCW 2.36.055 is the specific statute establishing the manner in which jury master lists are to be created, whereas RCW 2.36.080 is a general policy provision. The phrase "area served by the court," when read in light of RCW 2.36.055, clearly means the "jury assignment area" authorized by the statute. The specific statute must control.

Lanciloti also seems to argue that the fact that the prosecutor can request a pre-filing exception to the normal case assignment area makes the rule arbitrary. He is mistaken. LCrR 5.1(d)(3)(B) provides that the prosecutor "shall assign the case to the Case Assignment Area where the offense is alleged to have been committed." Without question, most cases will fall within this group. Exceptions to the rule are rational, not arbitrary. First, LCrR 5.1(d)(3)(C) provides that the prosecutor may invoke the exception when the location of the offense is unclear or where multiple acts were committed in several places. Second, LCrR 5.1(d)(3)(C)(ii) provides that a case must be handled in Seattle if the person is held as a fugitive from justice (meaning they are held on an out-of-jurisdiction warrant), if the case is a criminal appeal from district court,

or if it is a drug court case.[12] A defendant who objects to the case designation may ask the court for a transfer to the other case assignment area. LCrR 5.1(d)(3)(F). Moreover, the rule allows a defendant to request an all-county jury. LGR 18(e)(2).

Lanciloti also asserts that under the court rule all capital cases will be tried in Seattle with Seattle juries. Again, this is not correct. Although capital cases will likely be tried in the courthouse in Seattle due to security concerns, the rule permits an all-county jury or even a south-county jury to sit in Seattle if the just administration of justice so requires. LGR 18(e)(2). And, because capital cases require exceptionally large, specially summoned jury panels, it is likely that most capital venires will be summoned county-wide.

In any event, Lanciloti was arrested in Seattle for a non-capital offense that occurred in Seattle and he was assigned to the Seattle case assignment area. Any hypothetical challenges that might be brought under different facts will have to await a different case.

Finally, Lanciloti claims that the rule "allows a single judge to redraw the area from which a jury venire will be summoned whenever 'necessary for the fair and efficient administration of justice...' " Br. of

[12] Cases are adjudicated in Drug Diversion Court on a bench trial on stipulated facts. There are no jury trials. See http://www.metrokc.gov/kcscc/drugcourt/.

App. at 27. Again, this is simply an erroneous reading of the rules. Jury assignment areas can be redrawn only by the Office of the Administrator of the Courts, at the request of a majority of the superior court judges, not simply by a single superior court judge. In any event, there was no redrawing of boundaries in this case.

i. Error Must Be Preserved And Established As A Matter Of Fact.

Two issues warrant mention as to future cases. First, it should be the defendant's burden to establish a violation of the vicinage right. Such a violation is questionable in the cases tried in King County Superior Court in the eight months between the effective date of LGR 18 and the date the rule was suspended. During those eight months, many jury panels that appeared for service were actually summoned using the old master list, i.e. a master list drawn county-wide, but the jurors had deferred their service due to scheduling complications. The trial court in this case alluded to that fact in his ruling. RP 34, 40-41. In the interest of having the issue decided by this Court, the State is not asserting that fact as a procedural bar in this case. In other cases where the venire is challenged, however, it should be incumbent on an appellant to show that his jury was, in fact, summoned from less than the entire county.

Second, it should be incumbent on an appellant to show that he lodged a timely vicinage objection because, like venue, the right can be waived by failure to raise it in time for the trial court to summon a different jury. See State v. Dent, 123 Wn.2d 467, 479-80, 869 P.2d 1253 (1985) (failure to challenge venue is a waiver of the claim); State v. Ashe, 182 Wash. 598, 603, 48 P.2d 213 (1935); Right To Be Tried in County or District in Which Offense Was Committed, As Susceptible of Waiver, 137 A.L.R. 686 (originally published in 1942). No such procedural bar is asserted here.

2. RCW 2.36.055 AND LGR 18 ARE CONSTITUTIONAL UNDER THE SIXTH AMENDMENT.

Lanciloti also claims that LGR 18 has resulted in a jury selection procedure in King County that is unconstitutional under the federal constitution because it does not result in juries that are a fair cross-section of the population. His claim must be rejected. Differences in North and South King County are constitutionally insignificant, and there is no systematic exclusion of distinct groups from jury service.

a. Federal Constitutional Analysis

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

wherein the crime shall have been committed ... ." U.S. Const. Amend. VI. An impartial jury is not provided "if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." Taylor v. Louisiana, 419 U.S. 522, 530, 95 S. Ct. 692, 697, 42 L. Ed. 2d 690 (1975). An impartial jury is a jury venire drawn from a fair cross-section of the community. See Holland v. Illinois, 493 U.S. 474, 110 S. Ct. 803, 807, 107 L. Ed. 2d 905 (1990); Taylor, 419 U.S. at 527, 95 S. Ct. at 696. However

> "(o)ur duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty."

Taylor, 419 U.S. at 527-28 (quoting Brown v. Allen, 344 U.S. 443, 474, 73 S. Ct. 397, 416, 97 L. Ed. 469 (1953)). The fair cross-section requirement "is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." Holland, 493 U.S. at 480-81 (emphasis in original). The constitution does not require that the jury selection process result in jury venires that are a statistical mirror of the community. State v. Pelican, 580 A.2d 942, 946 (1990).

To establish a prima facie violation of the fair cross-section requirement, the burden is on the defendant to show: (1) that the group

alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579 (1979). A defendant is not required to establish intent to discriminate. 6 W. LaFave & J. Israel, Criminal Procedure (2007) §22.2(d) at 60.

Courts have developed a three-pronged test to determine whether a particular group of people is a cognizable or distinctive group under the Sixth Amendment: (1) the group must be defined and limited by some clearly identifiable factor (such as race or sex); (2) there must be a common thread or basic similarity in attitude, ideas or experience which runs through members of the group; and (3) there must be a community of interest among the members of the group to the extent that the group's interest cannot be adequately represented if the group is excluded from the jury selection process. Id. §22.2(d) at 55.[13] Whether a class or group of people is sufficiently distinct for the Sixth Amendment's fair cross-section analysis is a question of fact for the trial court. See Willis v. Zant, 720

[13] See also e.g., Ford v. Seabold, 841 F.2d 677, 681-82 (6th Cir. 1988); Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985); Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir.1983); State v. Rupe, 108 Wn.2d 734, 746, 743 P.2d 210, 218 (1987).

F.2d at 1216; Parks v. State, 254 Ga. 403, 410-11, 330 S.E.2d 686, 694 (1985).

Although courts have found that groups defined by ethnicity, gender, race, or religion are sufficiently distinctive for purposes of the fair-cross-section analysis, other groups, including blue collar workers, less-educated individuals, persons with disabilities, convicted felons, specified age groups (e.g., 18-29, over 70), suburban parents, and people excused from service for economic or personal hardships, have been found to be too small or insufficiently distinct to fall within the fair-cross-section analysis set forth in Taylor. 6 W. LaFave & J. Israel, Criminal Procedure (2007) §22.2(d) at 55 n.63, 56-58 n.66-70; see also Anaya v. Hansen, 781 F.2d 1, 3 (1st Cir. 1970)(groups recognized as distinct are generally "*special* groups like women and African-Americans, that have been subjected to discrimination and prejudice within the community" – emphasis in original); State v. McCoy, 320 N.C. 581, 359 S.E.2d 764 (1987) (small town residents not distinct group from rural residents).

Additionally, the exclusion of a particular group is not objectionable where it does not contravene the three purposes of the cross-section requirement: (1) avoiding the "possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the

community"; (2) avoiding an "appearance of unfairness"; and (3) ensuring against deprivation of "often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases." LaFave & J. Israel, Criminal Procedure §22.2(d) at 56 n.65.

b. Both The Northern And Southern Parts Of King County Provide A Fair Cross-Section Of The Community To Ensure Fair Juries.

There are several fundamental problems with Lanciloti's fair cross-section arguments. The first problem is that the Sixth Amendment analysis does not apply at all to his particular claim. The relevant question for a traditional Sixth Amendment analysis is whether juries in North or South King County are a fair cross-section of the population in the north or south parts of the county, i.e., a comparison of population in the jury assignment area to juries sitting in that area. Lanciloti has not supplied *any* data whatsoever to show that north-county juries are not representative of the northern part of the county.

Instead, he is trying to apply the Sixth Amendment analysis to the question of whether increased numbers of Hispanics – for example – will appear on North King County juries if the whole county is used as a draw, instead of only part of the county. This is simply a misapplication of the fair cross-section analysis. Nothing in the Sixth Amendment precludes choosing jury master lists from a part, rather than the whole, of the county.

See supra, p. 24 n. 6. In other words, the Sixth Amendment analysis applies only to the question whether jurors from the geographical area chosen by the state are a fair cross-section of that area, not some other area. Lanciloti's claim must fail for this very basic reason.

Even if one applies the fair cross-section analysis in this unprecedented way, however, it still fails. Lanciloti asserts that King County's division of the jury pool into two jury assignment areas results in demographic inconsistencies in the two assignment areas. He provided the trial court with population statistics[14] for King County in 23 categories, comparing the Seattle and Kent assignment areas to each other, as well as the county as a whole. Of the 23 categories, only those that pertain to race and/or ethnicity are even arguably distinct for purposes of the fair-cross-section analysis. None of the remaining demographic categories meet the three-part Duren test for distinctiveness set forth above, nor do any of those categories demonstrate an exclusion or reduction of a distinctive group in a manner that contravenes the three purposes of the fair-cross-section analysis.

Although there is no exact number or percentage of deviation required to demonstrate a lack of reasonable representation, "an absolute

[14] It should also be noted that his statistics are from the 2000 Census and pertain to gross populations and as opposed to populations of eligible jurors.

disparity[15] of 10 percent between [a] group's representation on the panel and [that] group's representation among those eligible for jury service has consistently been found to show underrepresentation." 6 W. LaFave & J. Israel, Criminal Procedure (2007) §22.2(d) at 60 n.75-76. The defendant in this case has produced data on gross populations; he has provided **no** data as to the number of people in any given category that are actually eligible to serve on a jury.[16] Thus, there is simply no way to conclude from this record that the eligible jurors in the population are not being summoned for jury duty, much less that they are being systematically excluded.

The only evidence of meaningful difference between north- and south-county populations in the data supplied by this defendant is the

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[15] There are two statistical measures by which the defendant can establish underrepresentation: absolute disparity and comparative disparity. Absolute disparity measures the difference between the percentage of members of the distinctive group in the relevant population and the percentage of group members in the jury venire (e.g., the difference between the percentage of eligible Hispanics in the population and the percentage of Hispanics in the jury venire). United States v. Royal, 174 F.3d 1, 7 (1999). Absolute disparity is "the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire." United States v. Forest, 355 F.3d 942, 954, vacated for reconsideration on other grounds, 543 U.S. 1100, 125 S. Ct. 1050, 160 L. Ed. 2d 1001 (2005).

In contrast, comparative disparity "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." Royal, 174 F.3d at 7. Comparative disparity is calculated by dividing the absolute disparity percentage by the percentage of the group in the population. Id. (i.e., calculating the percentage difference between the proportion of Blacks eligible to serve as jurors and the shortfall in Black representation).

[16] A person is eligible for jury service if he or she is over 18 years of age, an English-speaker, a United States citizen, a resident of the county where the trial is occurring, and if he or she has not been convicted of a felony. RCW 2.36.070.

difference between total Hispanic populations in the north and south of King County. But even this data does not establish a fair cross-section violation.

To make a prima facie case for a fair cross-section violation, many courts require a defendant to show absolute disparity in the percentage of eligible jurors versus the percentage of jurors who are summoned; it is not sufficient to show a disparity between the total population and the population of jurors who serve. See e.g. Sanders v. Woodford, 373 F.3d 1054 (9th Cir.2004) (underrepresentation of Hispanics on juries in California not proven where data did not identify the population of Hispanics in the community who were eligible to serve as jurors);[17] United States v. Forest, 355 F.3d 942, 954 (6th Cir.2004) (underrepresentation of Blacks on Ohio juries not proven by statistical data showing an actual disparity of 5.7 % between total population and juries, where no data presented on population of eligible jurors). As noted above, Lanciloti has made no effort, whatsoever, to show what percentage of the Hispanic population in the county -- or part of the county -- is eligible to serve on a jury.

[17] Cf. United States. v. Rodriguez-Lara, 421 F.3d 932 (9th Cir. 2005) (disagreeing that claimant must show population of eligible jurors).

Even applying the absolute disparity analysis to his total population data, however, Lanciloti cannot prevail. The absolute disparity between the total population of Hispanics in South King County versus the population of Hispanics in the county at large is 1.6%. What this means is that for every 100 jurors summoned, at least 5 Hispanics will appear from a county-wide pool, at least 7 will appear in a south-county pool, but only about 4 will appear from a north-county pool. An absolute disparity of 1.6% (between south-county and county-wide) or .92% (between north-county and county-wide) is far lower than the absolute disparities that have been held to establish a prima facie Sixth Amendment violation. See e.g. United States. v. Rodriguez-Lara, 421 F.3d at 944 n. 10 (noting that absolute disparities of 7.7% do not show a Sixth Amendment violation but that absolute disparities of 15% might show such a violation).[18]

So, Lanciloti cannot establish that the representation of the only legally cognizable groups—racial or ethnic minorities—in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community because none of the population statistics for each racial/ethnic category have an absolute disparity of 10 percent or greater.

[18] Counsel for defendant has suggested that the disparity in this case is on the order of 29%. A 29% disparity is not established by either the absolute or comparative method, so the propriety of counsel's statistical methods may be open to question.

Finally, even if Lanciloti has satisfied the second prong of the Duren test, he cannot satisfy the third prong. In other words, given the facially neutral jury-selection method in King County, in order to show a systematic exclusion pursuant to Duren, Lanciloti must identify an aspect of the system "that is: (1) the probable cause of the disparity, and (2) constitutionally impermissible." People v. Sanders, 51 Cal.3d 471, 492, 797 P.2d 561, 570, 273 Cal.Rptr. 537, 546 (1990). The defendant has not even attempted to do so.

For these reasons, the defendant has not shown that the method of selecting jurors in King County -- north or south -- violates the federal constitution.

c. Even Assuming Lanciloti Can Invoke A Juror's Right To Serve On Jury Duty, Under RCW 2.36.055 And LGR 18, No Juror Is Denied The Right To Serve.

Finally, citing Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), Lanciloti claims that jurors have a right to serve on a county-wide jury -- a right distinct from Lanciloti's right to *have* a jury from the whole county. This argument should be rejected.

First, Lanciloti cites to no constitutional provision, statute, or case that says a citizen has a right to serve on a jury beyond the vicinage defined by state law. Batson certainly does not say that, and the State is

unaware of any such authority. Thus, without any authority to support his argument that a juror has a right to serve on a particular jury, the argument should be rejected.

Second, even if there is a general right of citizens to serve on a jury of the vicinage, RCW 2.36.055 actually advances that right because it ensures that jurors will serve closer to home, i.e., in the vicinage instead of in a courthouse miles and miles removed from the juror's residence.

Third, Batson is not persuasive authority in any event. In Batson, the United States Supreme Court held that citizens have a right to serve as jurors and, more particularly, that they cannot be excluded from jury service based simply on their race. Thus, Batson dealt with two concepts that do not exist in this case: 1) excluding jurors from service; 2) excluding them based on their race. In this case, Lanciloti has failed to show that a single juror was or will be barred from jury service; his claim is only that they might not serve in a part of the county where they do not live. In fact, since RCW 2.36.055 and LGR 18 make it easier to serve, it stands to reason that it *increases* the chances that a juror will actually serve on a jury, and that more, not fewer, citizens will serve as jurors. Thus, the statute and the rule accomplish what Lanciloti claims Batson requires. Moreover, Lanciloti has not shown this statute and rule cause

any jurors to be barred from service based on race. His Batson-based arguments must be rejected.

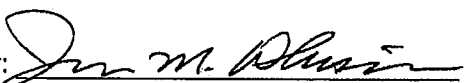
E. CONCLUSION

Selecting King County juries from the vicinage of the crime comports with the Washington constitutional provisions guaranteeing that right and will not diminish the fairness or impartiality of King County juries. Indeed, selecting local juries is likely to reduce the burden on jurors and increase the likelihood that more will be able to serve. The State respectfully asks this Court to hold that the King County system, authorized by express legislation, is constitutional.

DATED this 10th day of September, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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Certificate of Service by Mail

Today I sent by electronic mail to Eileen P. Farley and Ramona Brandes, the attorneys for the appellant, at Northwest Defenders Association,a copy of the BRIEF OF RESPONDENT, in STATE V. LANCILOTI, Cause No. 81219-5, in the Supreme Court of the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is ~~true~~ and correct.

Name James Whisman

Date 9/10/08

Done in Seattle, Washington

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